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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1975

No. 75-1601

DONALD GOODMAN, VINCENT N. DeGENNARO, MARY D. DeGENNARO, RIO CORPORATION, a New Jersey Corporation and DONGOOD CONTRACTING CORP., a New Jersey Corporation,

Petitioners,

vs.

LIZZA & SONS, INC., a New York Corporation, A. J. ORLANDO CONTRACTING CO., a New York Corporation and INSURANCE COMPANY OF NORTH AMERICA, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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BLEED THROUGH

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IN THE

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners Donald Goodman, Vincent N. DeGennaro, Mary D. DeGennaro, Rio Corporation, a New Jersey Cor-

poration, and Dongood Contracting Corp., a New Jersey Corporation respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey entered in this proceeding on February 4, 1976.

Opinions Below

The denial of the Petition for Certification by the New Jersey Supreme Court; the opinions of the Superior Court of New Jersey (Appellate Division) and the Superior Court of New Jersey (Law Division) appear in the Appendix hereto.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. §1257.

Questions Presented

1. Are the decisions of the New Jersey Courts denying a party the right to implead Third-Party Defendants in an action pending in New Jersey violative of the due process clause of the U. S. Const. Amend. 14?

2. Is the due process guarantee provided for in 14th Amendment of the U. S. Constitution violated when the New Jersey Courts barred the joinder in a New Jersey action instituted by a Third Party against one of the signers to an agreement restricting litigation to such signers to the Courts of the State of New York when such a joinder was not in contemplation of the parties at the time the agreement was executed?

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Statement of the Case

Plaintiff, Insurance Company of North America (I.N.A.) instituted a civil action in 1973 against the defendants, of whom, Dongood Contracting Corporation (Dongood) is the principal defendant and other defendants identified with it as guarantors of the plaintiff's bonds.

I.N.A.'s action is based upon the grounds that it as surety, on April 13, 1965 executed a Performance Bond and a Labor and Material Payment Bond, in which bonds Orlando Contracting Co., Inc. (Orlando), is named the obligee and Dongood is named the principal. I.N.A., as surety, under the said Labor and Materials Bonds, paid a sum total of $43,332.84 to various sub-contractors of Dongood which it now seeks to recover from Dongood along with its legal fees and miscellaneous expenses.

I.N.A. also on October 1, 1965 executed another Performance Bond and another Labor and Material Payment Bond in which bonds Lizza & Sons, Inc. (Lizza), is named the obligee and Dongood is named the principal. I.N.A. under the labor and Material Payment Bond paid a sum total of $167,741.47 to various sub-contractors of Dongood which it now seeks to recover from Dongood along with its legal fees and miscellaneous expenses.

I.N.A. also makes claim against Dongood based on a still pending and undetermined action instituted in 1968 by Lizza against I.N.A., and Dongood, on the same Performance Bond, supra, in the Supreme Court of the State of New York, County of Nassau for an alleged default by Dongood in the performance of its sub-contract with Lizza. In this action Dongood filed a counter-claim against Lizza, I.N.A. filed an answer therein but did not file a cross-claim against Dongood or any of the other petitioners herein who were guarantors under the said bonds.

Dongood impleaded Orlando and Lizza as Third Party Defendants in the New Jersey action *sub judice* under Rule 4:4-4(c) (1) (Long Arm Service Rule) by mailing a copy of the Summons and Third Party Complaint addressed to their respective places of business in the State of New York.

Dongood claims it was not in default under the I.N.A. Bond as to Orlando because Orlando failed to pay Dongood for the extra work and services performed by it knowing that Dongood was dependent upon these funds to be received from Orlando to pay its labor and Material suppliers and that Orlando was responsible for all of the sums of money paid by I.N.A. to material men for which I.N.A. is now suing Dongood.

Dongood in its Third Party Complaint against Lizza claims that Lizza Breached its contract with Dongood and failed to pay Dongood for the work, material and services rendered by Dongood and that Lizza is responsible for all of the sums of money which may be adjudged against it by virtue of the I.N.A. action.

Lizza moved to dismiss Dongood's Third Party Complaint in the New Jersey Law Division. It did not assert lack of Jurisdiction over it by the New Jersey Courts on the basis of minimal contacts but grounded its motion on the basis that the sub-contract agreement provides that any litigation should be brought only in Courts in Nassau County, State of New York.

Orlando also moved to vacate the service of process against it and to dismiss Dongood's Third Party Complaint for lack of jurisdiction in the New Jersey Courts.

Both of these motions were granted in the Superior Court of New Jersey Law Division in a common opinion. Dongood filed appeals therefrom in the Appellate Divi-

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sion of the New Jersey Superior Court. The Appellate Division affirmed, in a common opinion, the judgment of the Law Division substantially for the same reasons expressed by the Law Division of the Superior Court of New Jersey.

Petitioners sought Certification of the Appellate Division decision and sought Certification of the legal question whether or not the Court had jurisdiction over the respondent Orlando and whether or not the New Jersey Court should take jurisdiction in this case over the respondent Lizza notwithstanding the provision in the Agreement that any action against Lizza should be instituted in Nassau County, New York State.

The petition for Certification was denied by the New Jersey Supreme Court on February 4, 1976.

Reasons for Granting the Writ

Petitioners respectfully submit that there are special and important reasons for granting the requested Writ of Certiorari in this case.

The Superior Court of New Jersey (Appellate Division), in affirming the judgment of its Law Division, which was determined in a summary manner, violated the due process guarantee of the United States Const., Amend 14 which denied the petitioners the right to implead non-resident Third Party Defendants where the petitioners asserted claims against said Third Party Defendants which are involved in the subject matter of the plaintiff's (I.N.A.) claim against the petitioners.

Further the decisions of these Courts ousted the Courts of the State of New Jersey of jurisdiction of causes of action properly before the Court all in violation of the

due process guarantee under the United States Const., Amend 14 and that this Court should make a dispositive legal determination with precedential value for the protection of the rights of petitioners herein and those who may be similarly situated.

The decision of the New Jersey Courts which denied the right of petitioners (those who were guarantors) to implead non-resident Third Party Defendants in the New Jersey action instituted by I.N.A. against them to recover the money paid out on the Surety Bonds violated the due process guarantee of Amend 14 of the U. S. const. because the petitioners (guarantors) were not parties to the agreements entered into by Dongood and the impleaded parties, Lizza and Orlando. And therefore the petitioners as guarantors have the right to have the New Jersey Courts determine, in one action, whether or not the impleaded parties may or may not be responsible for the payment of the money claimed by I.N.A.

It also follows that should the New Jersey Courts determine that petitioners (guarantors) are liable to I.N.A. in the main action the petitioners (guarantors) would then be compelled to institute their own civil action against Lizza and Orlando in the Courts of the State of New York without the opportunity to stay the issuance of executions by I.N.A. while these actions against Lizza and Orlando are pending in the New York Courts.

The issues under the facts involved in this litigation are of novel import in the Country and are significant to litigants crossing state lines.

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CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinions of the Courts of the State of New Jersey.

Respectfully submitted,

SAMUEL J. DAVIDSON
Counsel for Petitioners
921 Bergen Avenue
Jersey City, N. J. 07306

[APPENDICES FOLLOW]

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APPENDIX A

Opinion of Superior Court of New Jersey, Law Division—Bergen County

(Filed—January 9, 1974)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—BERGEN COUNTY

DOCKET NO. L-20072-72

BERGEN COUNTY NO. 73-1197

INSURANCE COMPANY OF NORTH AMERICA, a corporation,

Plaintiff,

v.

DONALD GOODMAN, VINCENT N. DEGENNARO, MARY D. DEGENNARO, RIO CORPORATION, a New Jersey Corporation, and DONGOOD CONTRACTING CORP., a New Jersey Corporation,

Defendants and Third Party Plaintiffs,

v.

A. J. ORLANDO CONTRACTING CO., INC., a New York Corporation, and LIZZA & SONS, INC., a New York Corporation,

Third Party Defendants.

Messrs. Bruck and Bigel, Attorneys for Plaintiff.

Appendix A

Mr. Samuel J. Davidson, Attorney for Defendants and Third Party Plaintiffs.

Messrs. McCarter & English, Attorneys for Third Party Defendant Lizza & Sons, Inc.

Mr. Louis Auerbacher, Jr., Attorney for Third Party Defendant A. J. Orlando Contracting Co., Inc.

TOSCANO, J. S. C.

These are dual motions by the third party defendants for orders vacating the process served upon them by summons and third party complaint and dismissing the actions against them for lack of *in personam* jurisdiction over them by the New Jersey Courts.

Suit has been instituted in this case by plaintiff Insurance Company of North America (hereinafter INA) against the defendants, being principally Dongood Contracting Corporation (hereinafter Dongood), and the individuals identified with it. These defendants have impleaded A. J. Orlando Contracting Company, Inc. (Orlando), and Lizza & Sons, Inc. (Lizza) as third party defendants. The defendants-third party plaintiffs have attempted to serve process in this cause on Orlando by mailing the summons and third party complaint to Orlando at its place of business in New Rochelle, New York, and to Lizza at its place of business in Oyster Bay, Long Island, New York.

MOTION BY A. J. ORLANDO CONTRACTING COMPANY, INC.

The third party plaintiffs claim that the third party defendant caused damages to Dongood in connection with

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its bonded subcontract. The contract between Orlando and the State of Connecticut was signed and dated March 30, 1965. The subcontract of Dongood was with Orlando and was signed and dated June 3, 1965 at Wethersfield, Connecticut.

Orlando denies the existence of *in personam* jurisdiction over it by the New Jersey Courts. The contract and subcontract involved in this matter were for road construction for the State Highway Commissioner of the State of Connecticut for the relocation of Route 8, in the Town of Thomaston, Connecticut. Orlando claims that there were no negotiations with Dongood or its officers or anyone else in the State of New Jersey, but rather that it was approached in Connecticut by representatives of Dongood concerning the possibilities of a subcontract and that all contract negotiations and job work were conducted outside of New Jersey. Orlando asserts that it conducted no business of any kind, at any time in the State of New Jersey.

The only contacts by Orlando with the State of New Jersey which are even alleged by Dongood are telephone conversations by Orlando personnel located in New York and Connecticut with the Dongood personnel in New Jersey before and during the subcontract and letter correspondence from New York to New Jersey subsequent to the making and performance of the subcontract. Dongood contends that said telephone conversations were sufficient minimal contacts and form an adequate basis for *in personam* jurisdiction of the New Jersey Courts over Orlando in the instant case. None of the third party plaintiffs contend that any representative of Orlando physically entered into New Jersey at any time in connection with these mat-

ters, that any work was performed in New Jersey, that New Jersey law should apply or that New Jersey is the most convenient forum for all parties.

There are numerous decisions in the State of New Jersey arising out of the U. S. Supreme Court decision in *International Shoe Co.* v. *State of Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). The guiding principle is whether or not permitting third party plaintiffs to maintain their suit against Orlando does not offend "traditional notions of fair play and substantial justice." *Supra* at p. 316.

It is clear that each case which raises questions of "minimum contacts" must be decided on its own peculiar and particular set of facts and the questions to be answered in each case is whether traditional notions of fair play and substantial justice are subverted. *Oliff* v. *Kiamesha Concord, Inc.,* 106 N. J. Super. 121 (Law Div. 1969); *Knight* v. *San Jacinto Club, Inc.,* 96 N. J. Super. 81 (Law Div. 1967).

Accepting for the purposes of this motion all of the facts alleged in the affidavit of Donald Goodman dated November 28, 1973, the Court finds that there was no minimum contacts between Orlando and Dongood in the State of New Jersey to give the New Jersey Courts *in personam* jurisdiction over Orlando in this case.

The applicable standards to be met to give New Jersey jurisdiction over a foreign corporation are that the corporation must do some act or consummate some transaction within New Jersey, and the cause of action must be one which arises out of, or results from, activities of the corporation within the forum. *Hoagland* v. *Springer,* 74 N. J. Super. 275 (Law Div. 1962), aff'd 75 N. J. Super.

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660, aff'd 39 N. J. 32. In the case *sub judice*, the only act which Orlando is alleged to have performed in New Jersey was to make telephone calls from its offices and job sites outside New Jersey to Dongood and its representatives in New Jersey and to send correspondence to the Dongood office several years later. Obviously since Dongood had no permanent offices outside of New Jersey, the New Jersey address was the only place where correspondence was certain to be received. Also, events which occurred after the subcontract was negotiated and performed have little if any effect in determining whether New Jersey has *in personam* jurisdiction over Orlando in a suit based on the subcontract itself.

There is no dispute that the subcontract was signed outside of New Jersey and that all work connected thereto was performed outside of New Jersey. Therefore, the circumstances of this case can be distinguished from the situation present in *Avdel* v. *Mecure*, 58 N. J. 264 (1971) where manufacturing operations connected with the contract were performed in New Jersey.

The third party plaintiffs appear to rely heavily on the contention that telephone calls between Orlando representatives in New York or Connecticut and Dongood representatives in New Jersey constitute sufficient minimum contacts to give the New Jersey Courts *in personam* jurisdiction over Orlando. Although there may be situations where telephone solicitation or communications across state lines constitute sufficient minimum contacts with the forum state to vest it with *in personam* jurisdiction over the out of state caller, this is not such a case.

The recent case of *Certisimo* v. *Heidelberg Company*, 122 N. J. Super. 1 (Law Div. 1972), investigated the ques-

tion of what constitutes a "contact" sufficient enough to support long-arm *in personam* jurisdiction under R. 4:4-4(c)(1). Although New Jersey has limited itself only by the constitutional limit of long-arm service, *Roland* v. *Modell's Shoppers World,* 92 N. J. Super. 1 (App. Div. 1966), there is still some meaning to the concept of limited personal jurisdiction. See *Hanson* v. *Denckla,* 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 2nd 1283 (1958). There are two major requirements which have emerged for determining the present outer limits of *in personam* jurisdiction: (1) the defendant must have taken voluntary action calculated to have an effect in the forum state and (2) the act of defendant or the consequence caused by defendant must have a substantial enough connection with the forum state so that the exercise of jurisdiction over defendant does no violation to fundamental fairness. See *Certisimo, supra,* at p. 7-8.

The Court finds that Orlando's action in making initial telephone contacts with Dongood in New Jersey (assuming that Dongood is correct in alleging that there were such calls) was not action calculated to have any effect in New Jersey. Orlando and Dongood both knew that all construction work would necessarily be performed outside of New Jersey and that said State would in no way be affected by said work.

The contract was executed in Connecticut and the fact that Dongood was a New Jersey corporation was irrelevant. Orlando contemplated no effects in New Jersey and no effects have been demonstrated by Dongood. Also, the act of Orlando does not have a substantial enough connection with New Jersey to make the exercise of jurisdiction over it reasonable. There is no fair play or substantial justice in subjecting Orlando to this suit in New Jersey.

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Appendix A

The motion by Orlando to vacate service of process and dismiss the third party complaint for lack of personal jurisdiction is granted.

Submit appropirate order.

MOTION BY LIZZA & SONS, INC.

The third party plaintiffs claim that the third party defendant Lizza caused damages to Dongood in connection with its bonded subcontract. The contract between Lizza and the New York State Department of Public Works was signed on or about September 20, 1965. The subcontract between Dongood and Lizza was signed on September 20, 1965 in New York.

Lizza denies the existence of *in personam* jurisdiction over it by the New Jersey Courts. The contract and subcontract involved in this matter were for road construction for the New York State Department of Public Works for the reconstruction of a certain roadway located in Delaware County and Sullivan County, New York.

Lizza claims that there were no negotiations with Dongood or its representatives in the State of New Jersey. Lizza states that all contract negotiations and job work were conducted outside of New Jersey and that it has not conducted any business in New Jersey of any kind at any time since prior to September, 1964 one year prior to the Dongood subcontract.

Dongood contends that telephone conversations between representatives of Lizza in New York and representatives of Dongood in New Jersey and the mailing of estimate

checks and other unnamed and unproven correspondence by Lizza to Dongood's New Jersey mailing address were sufficient minimal contacts to form an adequate basis for *in personam* jurisdiction of the New Jersey Courts over Lizza in the instant case. None of the third party plaintiffs contend that any representative of Lizza physically entered into New Jersey at any time in connection with the subcontract, that any work was performed in New Jersey, that New Jersey law should apply, or that New Jersey is the most convenient forum for all of the parties.

As stated in the Orlando motion, *supra*, each case which raises question of "minimum contacts" must be decided on its own peculiar and particular set of facts and the question to be answered in each case is whether traditional notions of fair play and substantial justice are subverted. *Oliff* v. *Kiamesha Concord, Inc. supra; Knight* v. *San Jacinto Club, Inc., supra.*

As held in *Hoagland* v. *Springer, supra*, the applicable standards to be met to give New Jersey jurisdiction over a foreign corporation are that the corporation must do some act or consummate some transaction within New Jersey, and the cause of action must be one which arises out of, or results from, activities of the corporation within the forum. In the case *sub judice*, the only act which Lizza is alleged to have performed in New Jersey was to make telephone calls from its offices and job sites outside New Jersey to Dongood and its representatives in New Jersey and to send correspondence to the Dongood office. Since Dongood had no permanent offices or mailing address outside of New Jersey, the Hoboken address was the only place where correspondence was certain to be received.

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Appendix A

Accepting for the purposes of this motion all of the facts alleged in the affidavits of Donald Goodman and Vincent De Gennaro, the Court finds that there were no minimum contacts between Lizza and Dongood in the State of New Jersey to give the New Jersey Courts *in personam* jurisdiction over Lizza in this case. There is no dispute that the subcontract was signed outside of New Jersey and that all work connected thereto was performed outside of New Jersey. This cause of action necessarily arose out of, or resulted from, activities of Lizza outside of New Jersey.

As in the Orlando case, *supra*, the third party plaintiffs appear to rely on the contention that telephone calls between Lizza representatives in New York and Dongood representatives in New Jersey constitute sufficient minimum contacts to give the New Jersey Courts *in personam* jurisdiction over Lizza. Although there may be cases where telephone solicitation or communications across state lines constitute sufficient minimum contacts with the forum state to vest it with *in personam* jurisdiction over the out of state caller, this is not such a case. The exercise of jurisdiction in this case would violate fundamental fairness. Lizza's action in making telephone contacts with Dongood (assuming that Dongood is correct in alleging that there were such calls) was not action calculated to have any effect in New Jersey. Lizza and Dongood both knew that all construction work would necessarily be performed in New York. Lizza contemplated no effects in New Jersey and no effects have been demonstrated by Dongood. Also, the subcontract in question does not have a substantial enough connection with New Jersey to make the exercise of jurisdiction over Lizza fundamentally fair or reasonable.

There is another and independent ground advanced by Lizza as a basis for this Court's ruling on the motion; that is, a provision of the subcontract agreement itself (paragraph 19) provides that New York law shall apply and that any litigation brought by Dongood against Lizza concerning the subcontract agreement cannot be brought in any court other than those in the County of Nassau, State of New York. In said section Dongood expressly waived all rights it might have to bring action in any other court.

Dongood has not challenged the validity or fairness of paragraph 19 of the subcontract agreement but rather asserts that it does not apply in the case where Lizza is being impleaded as a third party defendant. This Court is unable to accept that position and holds that the provision is just as applicable to a third party action as it is to an initial complaint. Dongood is in no way prevented from suing Lizza in New York on an indemnity theory for a judgment against it by INA in the New Jersey Courts.

Recent New Jersey case law seems to follow the principle adopted by the *Restatement (2nd) of Conflict of Laws* §80, (1970), which holds that the parties' choice of forum will be given effect unless it is unfair or unreasonable. See *Air Economy Corp.* v. *Aero-Flow Dynamics,* 122 N. J. Super. 458 (App. Div. 1973).

The Court finds the subcontract provision to be neither unfair, unreasonable nor against the public policy of New Jersey, considering the facts of this case.

The motion by Lizza to vacate service of process and dismiss the third party complaint for lack of *in personam* jurisdiction is granted.

Submit appropriate order.

JAMES I. TOSCANO, J.S.C.

Dated: January 9, 1973

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APPENDIX B

Opinion of Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

INSURANCE COMPANY OF NORTH AMERICA,
a corporation,

Plaintiff,

v.

DONALD GOODMAN, VINCENT N. DEGENNARO, MARY D. DEGENNARO, RIO CORPORATION, a New Jersey Corporation, and DONGOOD CONTRACTING CORP., a New Jersey Corporation,

Defendants and Third-Party Plaintiffs-Appellants,

v.

A. J. ORLANDO CONTRACTING CO.,
a New York Corporation,

Third Party Defendant-Respondent,

and

LIZZA & SONS, INC., a New York Corporation,

Third Party Defendant.

(A-1730-73)

Appendix B

Argued September 17, 1975—Decided September 30, 1975

Before Judges Matthews, Lora and Morgan

On appeal from Superior Court of New Jersey, Law Division, Bergen County

Mr. Samuel J. Davidson argued the cause for defendants and third party plaintiffs-appellants (Mr. Edward J. Liguori on the brief).

Mr. Louis Auerbacher, Jr. argued the cause for third party defendant-respondent, A. J. Orlando Contracting Co.

Mr. Richard C. Cooper argued the cause for third party defendant-respondent Lizza & Sons, Inc. (Messrs. McCarter & English, attorneys).

PER CURIAM

The judgment of the Law Division in A-1730-73 in which case A. J. Orlando Contracting Co. is third party defendant-respondent is affirmed substantially for the reasons set forth in the written opinion of Judge Toscano.

Third party defendant-respondent Lizza & Sons, Inc., in A-1731-73, stated at oral argument that it maintains a registered agent in New Jersey and since it would thereby be subject to service of process in New Jersey it does not, in defense of this appeal, assert lack of jurisdiction on the basis of minimal contacts. Rather it relies only on so much of the trial judge's opinion which holds that paragraph 19 of its subcontract agreement with Dongood (providing that New York law should apply and that any litigation concerning the subcontract agreement may be

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brought only in the County of Nassau, New York) is as applicable to appellant's third-party action as it is to an initial complaint and is not unfair, unreasonable or against public policy.

We agree that under the circumstances of this case the agreement to litigate in New York should be enforced. *Air Economy Corp.* v. *Aero-Flow Dynamics*, 122 N. J. Super. 456, 457 (App. Div. 1973); *Central Contracting Co.* v. *C. E. Youngdahl & Co., Inc.*, 418 Pa. 122, 209 A. 2d 810, 816 (Sup. Ct. 1965).

The judgment of the Law Division in A-1731-73 is affirmed.

A True Copy

ELIZABETH McLAUGHLIN
Clerk

APPENDIX C

Order of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
C-333 SEPTEMBER TERM 1975

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff,

vs.

DONALD GOODMAN, *et al.*,

Defendants-Petitioners,

vs.

LIZZA & SONS, INC.,

Defendant-Respondent,

and

A. J. ORLANDO CONTRACTING CO.,

Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

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Appendix C

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Worrall F. Mountain, Presiding Justice, at Trenton, this 4th day of February, 1976.

FLORENCE R. PESKOE
Clerk

A True Copy

FLORENCE R. PESKOE
Clerk

FILED
FEB 4 1976

FLORENCE R. PESKOE
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

DONALD GOODMAN, VINCENT N. DEGENNARO, MARY D. DEGENNARO, RIO CORPORATION, a New Jersey Corporation and DONGOOD CONTRACTING CORP., a New Jersey Corporation,

Petitioners,

vs.

LIZZA & SONS, INC., a New York Corporation, A. J. ORLANDO CONTRACTING CO., a New York Corporation and INSURANCE COMPANY OF NORTH AMERICA, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Counter-Statement of Facts

The statement of the case in the petition of the petitioners is substantially correct as to the nature of the

proceedings in the New Jersey courts. However, there is a substantial misstatement as to the alleged liability of respondent A. J. Orlando Contracting Co. (hereinafter "Orlando").

The gross misstatement appeared in the second paragraph on page 4 of the printed petition. The misstatement is with respect to the claim of the petitioners in the following statement:

> "Dongood claims that it was not in default under the I.N.A. Bond as to Orlando because Orlando failed to pay Dongood for the extra work and services performed by it knowing that Dongood was dependent upon these funds to be received from Orlando to pay its labor and Material suppliers and that Orlando was responsible for all of the sums of money paid by I.N.A. to material men for which I.N.A. is now suing Dongood."

The erroneous part of the statement is the allegation that "Orlando failed to pay Dongood for the extra work and services . . ." The claim of petitioners on which the proceedings was based is not on alleged nonpayment for claimed extra work and services performed. The claim as appears from the record in the cause is that at the request of petitioners Donald Goodman, Vincent N. DeGennaro, Mary D. DeGennaro, Rio Corporation and Dongood Contracting Corp. (hereinafter "Orlando"), a so-called liquidation agreement was executed where by Orlando agreed that it would process a claim on behalf of Dongood. This claim was to be prosecuted against the State of Connecticut but in the name of Orlando since Orlando was the contractor with the State of Connecticut (Da36a-3-1 to 5). Dongood was the subcontractor who could not so proceed.

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This agreement was negotiated out of the Orlando offices through Attorney James F. Kenney (namely Messrs. Clancy, Kenney, Flynn & Ford, Esqs.) with offices at Bridgeport, Connecticut (Da361-3-12 to 19). A copy of the letter from Attorney Kenney dated January 6, 1968 is annexed to the supporting affidavit of Orlando (Da36a-5). Under date of October 30, 1970 Attorney Kenney wrote to Orlando advising that the claim would have to be prosecuted on or before March 29, 1971 (Da361-7); and Orlando sent a copy to Dongood with respect to the necessity for proceeding by the date set. However, Dongood did not proceed as required so that the claim could be processed.

Dongood was then advised by Orlando with respect to its failure to proceed on the prosecution of the claim stating, "If we do not hear from you by February 10, 1971, we will consider the matter closed." (Da361-10).

No response was received then or at any time thereafter from Dongood. The time limitation for prosecuting the claim passed by reason of the failure of Dongood to proceed as requested (Da361-5 through 10).

Since there was a complete lack of response by Dongood it, therefore, had no further rights on the claimed agreement with Orlando for prosecution of the claim.

In any event on July 22, 1972 a settlement was made by these parties, that is the petitioners and Orlando, whereby payment was made by Orlando to Dongood in the sum of $16,349.15. A general release was executed by Dongood in favor of Orlando and others. While the appendix of appellants' brief in the Appellate Division of the Superior Court of New Jersey does not carry this copy, such as annexed to the affidavit of Orlando (Da36a-4-16 to 20). The record will show that it was so annexed;

and a copy of the release appears in the appendix annexed to the answer of Orlando (Da34a-7 to 8).

As to the claim respecting performance of the contract there were no supporting allegations submitted on behalf of Dongood as to any acts in New Jersey with respect to the *performance* of the subcontract. There are general allegations as to telephone conversations; but nothing appears in the record as to when they took place, or whether or not such telephone conversations had any bearing upon the performance of the contract agreement.

It was not disputed that the contract was made in the State of Connecticut and that all acts pertaining to the performance of the contract took place in the State of Connecticut and nowhere else.

Orlando also maintained that to compel it to litigate in the State of New Jersey would violate "traditional notions of fair play and substantial justice". It appears that in order to defend the case in New Jersey, Orlando would require as witnesses officials of the State of Connecticut who would not be subject to appearance at a trial by subpoena.

Reasons Why the Writ Should be Denied

The court should not grant a Writ of Certiorari because the State of New Jersey did not have jurisdiction. The sole arguments presented by the petitioners are as follows:

1. That the petitioners are being sued in the courts of New Jersey and believe that by reason of the claim against them, it is necessary to implead Orlando as a third party defendant because of the burden upon them

BLEED THROUGH

in the event of an adverse decision against them by plaintiff, they would then have to resort to instituting action in the Connecticut court to recover for alleged damages sustained in the suit in New Jersey.

2. That even though the contract between the parties (Orlando and Dongood) was executed in Connecticut and performed in its entirety in Connecticut, nevertheless because of telephone talks from Orlando in the State of Connecticut to the offices of the petitioners in New Jersey, that this was sufficient to give the courts of New Jersey jurisdiction. There is no proof submitted in any form as to when the telephone conversations took place or as to what bearing, if any, they had on the performance of the contract. The contract itself was not for monies claimed to be owing for labor and material supplied by petitioners for which it had been paid. Dongood claims that it engaged Orlando to prosecute a claim for it against the State of Connecticut on the Connecticut contract of Orlando. The proofs, which were not denied, showed that petitioners (Dongood) failed to supply the support required for the application. The result was that application for relief against the State of Connecticut could not be successfully prosecuted. Subsequently Dongood released Orlando of all claims which it had against it.

Orlando contends that to compel it to litigate this third party action against it in New Jersey would violate "traditional notions of fair plan and substantial justice." Orlando, an out-of-state corporation, would have to rely for its defense on officials of the State of Connecticut because the claim of Dongood was against the State of Connecticut on the state contract. Orlando could not compel the attendance of the necessary officials as witnesses and would be obviously handicapped in its defense. It would not be

"fair play" thus to compel it to litigate with this handicap; particularly when no part of the contract was performed in the State of New Jersey.

The petition of Dongood cites no decisional law to support its application. The opinion of the trial court set forth in Appendix A of the petition is amply supported by New Jersey decisional law as well as its findings of fact. The Appellate Division of the Superior Court of New Jersey affirmed substantially for the reasons set forth in the written opinion of Judge Toscano in Appendix A (2a to 7a). Upon petition for certification to the Supreme Court of New Jersey, there was a denial by the court (14a to 15a).

Respectfully submitted,

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